

THE HONORABLE J. RICHARD CREATURA

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

TOUCHPOINT COMMUNICATIONS, LLC,  
an Oregon Limited Liability Company,  
Plaintiff,

vs.

DENTALFONE, LLC, a Florida Limited  
Liability Company  
Defendant

Case No.: 3:15-CV-05240-JRC

PLAINTIFF TOUCHPOINT  
COMMUNICATION, LLC'S REPLY TO  
THE OPPOSITION TO THE MOTION FOR  
PARTIAL JUDGMENT ON THE  
PLEADINGS - COPYRIGHT NON  
INFRINGEMENT

NOTICE ON MOTION CALENDAR:  
December 11, 2015

**ORAL ARGUMENT REQUESTED**

**REPLY BRIEF**

Plaintiff TOUCHPOINT COMMUNICATIONS, LLC, dba WEO Media ("WEO"),  
moves for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c), and respectfully requests  
that this Court enter partial judgment in favor of WEO on its first cause of action – Declaratory  
Judgment of non-infringement under the Copyright Act.

1 **I. WEO SHOULD BE GRANTED THE PARTIAL JUDGMENT ON**  
 2 **PLEADINGS OF COPYRIGHT INFRINGEMENT UNDER THE HOLDING**  
 3 **OF *MEDTRONIC, INC VS. BOSTON SCIENTIFIC CORP*, 571 U. S.**  
 4 **(2014).**

5 In its moving papers, WEO argued that Copyright Infringement is a compulsory  
 6 counterclaim to a declaratory judgment of noninfringement, and that partial judgment on the  
 7 pleadings should be granted. (Dckt. 38). Dentalphone, LLC (“DF”) agrees that that such relief is  
 8 procedurally correct, but disagrees that removal of the claim should have any effect. (Opposition,  
 9 Dckt. 41, pg 1). WEO disagrees under the holding of *Medtronic Inc. v. Bos. Scientific Corp.*, 695  
 10 F.3d 1266 (Fed. Cir. 2012).

11 *Medtronic* was a patent case that involved two competitors, Medtronic and Boston  
 12 Scientific. (Dckt. 41) at 1. *Medtronic* also involved Mirowski Family Ventures, LLC, (“MFV”),  
 13 a licensing entity related to the inventor. *Id.* Medtronic sued for declaratory judgment of non-  
 14 infringement regarding several products that MFV claimed infringed their patents. *Id.* A key  
 15 issue in the litigation was which party bore the burden of proof regarding non-infringement.

16 At a bench trial, the trial court stated in its opinion regarding the burden of proof.

17 ...*Under Sea Industries, Inc. v. Dacor Corp.*, 833 F.2d 1551, 1557  
 18 (Fed.Cir.1987), which states that “[t]he burden always is on the patentee to show  
 19 infringement,” and thus held that “[a]s the parties asserting infringement,  
 20 defendants bear the burden of proof by a preponderance of the evidence.” See  
 21 *Medtronic*, 695 F.3d 1266 at 1272 (Fed. Cir. 2012)

22 The Federal Circuit disagreed. Our Supreme Court reversed the Federal Circuit  
 23 and agreed with trial court. *Medtronic, Inc. v. Bos. Scientific Corp*, 571 U.S. \_\_\_\_ (2014).  
 24 Stating:

25 “To shift the burden depending upon the form of the action could create  
 26 postlitigation uncertainty about the scope of the patent. Suppose the evidence is  
 27 inconclusive, and an alleged infringer loses his declaratory judgment action  
 28 because he failed to prove noninfringement. The alleged infringer, or others, might  
 continue to engage in the same allegedly infringing behavior, leaving it to the  
 patentee to bring an infringement action. If the burden shifts, the patentee might  
 lose that action because, the evidence being inconclusive, he failed to prove  
 infringement. So, both sides might lose as to infringement, leaving the infringement  
 question undecided, creating uncertainty among the parties and others who seek to  
 know just what products and processes they are free to use.”*Id* at 7-8.”

DF has withdrawn its Copyright claim from its original cross-complaint by failing to plead the copyright claim in its First Amended Cross-complaint. (“FACC”) What remains is the Declaratory Judgment claim for non-infringement and DF’s answer. Since WEO does not have the burden of proof and DF only has affirmative defenses, the parties in this case are in the same position as the parties in *Medtronic*. This is because a compulsory counterclaim to a request for declaratory judgment of non-infringement is the counterclaim for infringement. *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 802 (Fed. Cir. 1999).

Given the “historic kinship” between patent law and copyright law, there should be the same result whether it is patent infringement or copyright infringement. *Silvers v. Sony Pictures Entertainment, Inc.*, See 402 F.3d 881, 887 (9th Cir. 2005). Issues of noninfringement and declaratory judgment are almost identical in both areas of law.

The goal of a declaratory judgment action is to determine the respective rights of the parties, taking into consideration the Court’s time and resources. FRCP §1. For DF’s counsel to send threatening demand letters claiming copyright infringement to third party customers (costing WEO over \$ 700,000.00 in lost business.) and then withdrawing the counterclaim of noninfringement by stating:

“However, Dentalfone clarifies here that this decision is due in part to Dentalfone’s belief that such a count, at this stage of the litigation, is premature because no copyright registration has been issued by the Copyright Office”  
Opposition at 1.<sup>1</sup>

DF’s perfunctory statement is the legal equivalent of DF shrugging its shoulders and saying “no harm no foul.”. Particularly when contrasted with the language in DF’s demand letter copied to WEO’s customer, Smiles Dental (Dckt 1,pg 20) :

The purpose of this letter is to reiterate that your continued use of the Infringing Product constitutes infringement of Dentalfone’s copyrights and trade dress rights in the Dentalfone Design. Moreover, inasmuch as Dentalfone has previously provided you with notice of such infringement, any continued use by you of the Infringing Product constitutes willful infringement of Dentalfone’s Design.

In this case however, DF’s actions caused significant harm to WEO.

<sup>1</sup> No copyright registration is needed to file an infringement action. See *Cosmetic Ideas, Inc. v. Iac/Interactivecorp.*, 606 F.3d 612,622 (9th Cir., 2010)

DF has waived its compulsory counter claim by failing to replead it in the FACC and as such WEO the Court should enter declaratory judgment on the copyright infringement issue.

## **II. CONCLUSION**

DF has withdrawn its claim for copyright infringement in its First Amended Cross Complaint. Thus, DF no longer considers WEO an infringer. Therefore, this Court should grant WEO's motion for partial judgment on the pleadings on WEO's first cause of action for declaratory relief for noninfringement of DF's copyrights.

Dated: December 11, 2015

Respectfully Submitted,

/s/ J. Curtis Edmondson

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